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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 276

A. C. BECKEN CO., AN ILLINOIS CORPORATION,
Cross-Petitioner,

vs.

THE GEMEX CORPORATION, A NEW JERSEY CORPORATION,
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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A. C. Becken Co., plaintiff below, cross-petitioner, asks this Court to review the judgment of the Court of Appeals for the Seventh Circuit on the second appeal in this case.

In the first appeal the Court of Appeals held the Gemex Corporation liable for violation of the antitrust laws, and reversed and remanded, with instructions to complete the proceedings on the amount of damages and fees to be awarded Becken, 272 F. 2d 1. Gemex petitioned for certiorari and the petition was denied, 362 U. S. 962. On remand, the District Court entered judgment for damages and fees and on cross appeals, the Court of Appeals affirmed the damage award, and reversed and remanded with instruc-

tions to reduce the award for fees. Judgment was entered February 28, 1963, and Becken's petition for rehearing *en banc* was denied April 9, 1963. Gemex, as petitioner, has asked for certiorari to review the amount of damages awarded, petition No. 1122, October Term, 1962. This cross-petition is presented for review of the standards of proof to be applied to determine the amount of damage after a wrongful refusal to deal, and on what is a reasonable award for attorney's fees, both under 15 U. S. C. A. Section 15.

OPINIONS BELOW

The opinion of the Court of Appeals in the first appeal is reported at 272 F. 2d 1 (Appendix B). Gemex's petition for certiorari was denied at 362 U. S. 962. The findings of fact and conclusions of law of the District Court on damages are reported in 199 F. Supp. 554 (Appendix C), and on fees in 204 F. Supp. 28 (Appendix 360-363). The opinion of the Court of Appeals on which review is sought here is reported at 314 F. 2d 839 (Appendix D), and Gemex, defendant below, petitioned for certiorari, petition number 1122, October Term, 1962. This is a cross-petition by Becken, plaintiff below. The opinions below appear in A through F of the Appendix to the Gemex petition, 1122, and the findings and conclusions of the trial court on fees appears in Appendix pages 360-363.

THE RECORD

Gemex, cross-respondent, filed certified copies of the appendix and exhibit volume in the proceedings below. The appendix from the first appeal, and the joint appendix, from the second appeal, are numbered consecutively, and any record reference will be to the appropriate page in the appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered February 28, 1963 (Appendix E), and the petition by Becken for rehearing *in banc* was denied April 9, 1963 (Appendix F).

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. A. Section 1254(1).

STATUTES.

The damage award and the award for fees were both made pursuant to the provisions of Title 15 U. S. C. A. Section 15 (Appendix A), after Gemex was found guilty of violating the anti-trust laws.

STATEMENT.

On August 2, 1956, Gemex, a manufacturer, refused to continue to sell watchbands to Becken, a wholesale jewelry distributor. Becken filed suit November 23, 1956, and alleged that the refusal was a violation of Section 1 of the Sherman Act, 15 U. S. C. A. Section 1, and asked for damages for continuing harm (Appendix 5, Par. 8(b)). At the trial, as part of its prima facie case, Becken projected anticipated lost profits and proved actual damages of $56,007.04.[1] Becken's proof was made by projecting anticipated lost profits. The projections were based on 43 years of experience in the field, and the fact that Becken had a national sales force that had been selling the Gemex prior to the cutoff (272 F. 2d 1, 3-5; Appendix B, 6a-9a). However, on March 24, 1959, the trial court entered findings of fact and conclusions of law and dismissed the complaint.

1. On remand this amount of Becken's proof of actual damage was amended by leave of court to $57,007.04 (Appendix 202-203, 292-294, 304).

There had not been any pre-trial motion for summary judgment, but at the close of Becken's case in chief, Gemex moved for judgment, and the trial court dismissed the complaint. Prior to trial, Gemex elected not to make any discovery whatsoever on the damage Becken alleged.

On appeal, on November 27, 1959, the Court of Appeals reversed and held that Gemex had violated Section 1. The Court (Appendix B, 9a) said that although judgment for plaintiff could have been entered, in the ends of justice, Gemex should have the opportunity to put in its proof on the amount of damage. This was to be against Becken's proof already in the record on the amount of damage, and Becken was to be permitted to offer rebuttal evidence, and the Court remanded with such instructions. The Court also directed the trial court to assess a reasonable amount for attorney's fees, under Section 15 of the Act. As set out above, Gemex petitioned for certiorari and the petition was denied on 362 U. S. 962.

On remand, the trial was completed. Four years had elapsed since Gemex refused to sell to Becken. Gemex contended that it could take advantage of the passage of time by offering proof of a decline in the general watchband market to overcome Becken's projected anticipated losses. Becken objected to this line of evidence because its proof was based on past experience, and in its success in the market because of its own national sales force. The trial court discounted all of this line of proof, except for general market conditions not attributable to Gemex (Appendix C, 22a, Concl. 7). This general proof, however, was one basis the trial court used to reduce damages. Yet Gemex also introduced Becken's sales records for the four years after the illegal cutoff, but these records showed an increase in sales on major lines of watchbands. These records were obtained when Gemex served Becken with

interrogatories after the case was reversed on the first appeal.

After the case was reversed, Gemex also asked for Becken's sales invoices for sales prior to the original trial. However, Becken had a long established business practice of destroying sales invoices after two years, and when no discovery was made prior to commencement of trial, this material was destroyed, but only after the original portion of the trial was completed. On rebuttal Becken substantiated that its sales on major lines of watchbands increased after the cutoff date, and this actual sales experience for four-years after the cutoff date substantiated the accuracy of the original projections. As an alternative to the market defense, Gemex attempted to show a valid reoffer to sell to mitigate damages, but this line of proof was rejected on the evidence (Appendix C, 23a, Concl. 11, 12).

On September 29, 1961, the trial court entered findings and conclusions, and determined that Becken's actual damages were only $24,764.68. The court used the same five-year period that Becken had used, but made its own computation on what sales should have been anticipated. The court found that any fall in the general market, not attributable to the violation could be used to reduce damage. The court disregarded the uncontroverted fact of Becken's own sales increases during the period. The trial court made additional deductions from Becken's damages for additional anticipated sales commissions against anticipated sales (Appendix C).

The trial court was affirmed after cross-appeals were filed from this judgment. The Court of Appeals did not deal with the question of what proof was proper after a refusal to deal, or with Becken's contention that the Court had committed plain error when it caused double deductions for sales commissions, although the fact of a double

deduction was undisputed. The Court said Becken could not complain since it had permitted invoices to be destroyed *pendente lite*.

The trial court, after a hearing, also entered judgment for $25,000.00 as a reasonable award for attorney's fees. Becken provided competent proof in support of this award, covering counsel's responsibility in advising Becken to withdraw from an active market rather than act illegally with Becken, the steps in preparation, trial, and appeal, and the successful result, the uniqueness of the cause of action, the standards of counsel, and the court's awareness of the conferences and appearances in the case. Becken's case was supported by testimony of an expert witness and Gemex admitted his qualifications. Gemex did not see fit to put in any proof whatsoever. However, the Court of Appeals summarily reduced this award to $17,500.00 on the cross-appeal (Appendix D).

QUESTIONS PRESENTED

Where defendant's violation of the anti-trust laws for refusal to sell to plaintiff, and plaintiff's right to damages under the provisions of 15 U. S. C. A. Section 15, are established and

(1) (a) where proof of damage after an illegal cutoff is made by projections of anticipated lost profits, and corroborated by actual sales experience after the cutoff, is it plain error to reduce the amount of damage solely on the basis of general market conditions;

(b) where projected lost profits are made after deduction of sales and overhead expenses, is it plain error for the court to reduce such profits by double deductions for such sales commissions, on the ground that records were

not preserved, when the double deduction is uncontroverted, and there is no showing that the record would show otherwise;

(2) Can the Court of Appeals summarily reduce an award for attorney's fees, which the award is supported by uncontroverted evidence, and can the award be reduced unless the award is clearly erroneous under F. R. C. P. 52 (a)

REASONS FOR GRANTING THE WRIT

Title 15 U. S. C. A. Section 15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Appendix A.)

This case raises the question of the standards of proof to be applied on the amount of damage sustained in case of an illegal refusal to deal, and the standards to be applied to determine the reasonable amount to be allowed for fees as part of damages in anti trust cases.

This Court confirmed that treble damages could be recovered for violation of the anti trust laws, 15 U. S. C. A. Section 15, after a refusal to deal, in *Eastern v. Lorain*, 1915, 235 U. S. 592. However, this Court has never considered the standards of proof to be applied to determine the actual amount of such damages, and the Court has never considered the standards to be applied to determine what is a reasonable award for attorney's fees, under Section 15 of the statute.

The Amount of Damage

The intent of Congress is clear: damage sustained by violation of anything forbidden in the anti-trust laws shall be recovered. In the present case damage of $57,007.03 was proved by projection based on competent evidence of past sales experience and ability. In the proceedings on remand, this proof was corroborated by uncontroverted proof of actual sales after the cutoff. This opinion below permits general market conditions to overcome this proof. The opinion is contrary to the policy of Section 15 of the statute. The opinion also permits duplicate deductions for sales commissioners to reduce plaintiff's award. The fact that the deductions are duplications was uncontroverted. The opinion below permitted this plain error by misapprehending a doctrine on destruction of records and has permitted the defendant who caused harm to escape the full measure of its liability.

This Court has never reviewed the standards of proof to be supplied in a cutoff or refusal to deal case. Review should be granted in this case to set standards that comply with the policy of Section 15 of the statute.

The Award for Attorney's Fees

The standards to be applied to determine the reasonable amount to be awarded as attorney's fees under 15 U. S. C. A. Section 15, has significance beyond the interests of the litigants in this case, and the standards applied in this case do not follow the standards applied in other circuits.

Congress established the fee award as a part of damage to the successful anti-trust litigant. The standards to be applied to determine the amount of the award will therefore be significant in every civil damage action under the

anti-trust laws. This Court should grant review on this question because of the importance of legislative policy expressed in Section 15 of the statute, to resolve any conflict in the circuits, and to set standards to be applied in all future civil damage anti-trust actions.

The trial court in this case applied six standards to determine the reasonable fee award (Appendix 360-363):

(a) The fact that the prevailing party did not have the benefit of any judgment or decree in a prior action;

(b) Counsel took on special responsibility in this case to advise the client to withdraw from an active market rather than enter into a conspiracy;

(c) The case was unique on liability under Section 7 of the Act, and there was complexity in dealing with the damage issue;

(d) Counsel devoted somewhat over 600 hours, and a reasonable rate during the time of suit was $50 per hour (or a greater total than the amount awarded by the trial court);

(e) The plaintiff was ultimately successful, and damages were awarded;

(f) The Court was aware of conferences, argument, and work necessary up to the time of final judgment, including each trial and appellate step in this case.

The evidence in this case was uncontroverted on each of these points. However, the Court of Appeals applied only two standards: The amount of actual damages awarded, and time of counsel, (and the latter was misapplied, as set out in point (d) above). In the same circuit, however, the Court awarded fees approximately equal to actual damages in *Clapper v. Original Tractor Cab Co.*,

7 Cir., 1959, 270 F. 2d 616, at 628, and the successful litigant there had both a decree in a prior patent action with the parties to rely upon, and a settlement award with two of three defendants, and out of which counsel was presumably paid. The fee award approximated damages in *Richfield Oil Corp.* v. *Karseal*, 9 Cir., 1959, 271 F. 2d 709, 711.

Trial and appellate steps necessary to establish liability were considered in *20th Century Fox Theatre Corp.*, 8 Cir., 1952, 194 F. 2d 846, and followed in *Cape Cod Cranberry* v. *National Cranberry*, D. C., Mass., 1954, 149 F. Supp. 242, 244. Time of counsel as well as steps necessary for recovery were carefully considered by Judge Holtzoff in *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 1955 D. C. C., 166 F. Supp. 865 (reversed on liability, 243 F. 2d 418, certiorari denied, 355 U. S. 822), at page 866. In the circuit below, additional fees on appeal were awarded to the litigant who successfully defended an award in *American Cap Co.* v. *Latoga*, 7 Cir., 1930, 44 F. 2d 763, 772.

Fees were reduced in *Milwaukee Towing Co.* v. *La Crosse*, 7 Cir., 1951, 190 F. 2d 564, 565, 570, but only because of prior decrees in the cases in the same industry, without novel issues. The same result occurred in *20th Century Fox Film Corp.*, referred to above. The standards applied by the trial court in this case were outlined in *Neon Motor Freight, Inc.* v. *Eastern R. R. Pres. Conf.*, E. D. Pa., 1958, 166 F. Supp. 163, 168-169 (reversed on liability, after appeal, 365 U. S. 127). Here each standard was met by competent and uncontroverted proof. In the *Richfield* case, referred to above, at page 712, the court held a fee award subject to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. The Court of Appeals in this case, however, arbitrarily reduced the award, even though not clearly erroneous as required by this rule.

CONCLUSION

Cross-Petitioner therefore requests this Court to grant review of this case on the grounds set forth above.

Respectfully submitted,

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